IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.3079 OF 2005

Sanjay Traders, .. Petitioner

Vs

Shri Shivajirao L Kanakdhar,
since deceased by his L Rs:
(i) Shri Haribhau Shivaji Kanakdhar
and anr. .. Respondents.

Mr S.S.Shah, for the petitioner.
Mr Shrishail Sakhare, for respondent nos 1 and 2.

CORAM : D.B.BHOSALE,J.
DATE : 18.09.2006

PC:

1. Heard the learned counsel for the parties.

2. Rule. Returnable forthwith. Mr Sakhare, learned counsel, waives service for respondent nos 1 and 2. By consent, rule is heard finally.

3. The petitioner-plaintiff in this writ petition under Article 227 of the Constitution of India, has taken exception to the order dated 27.2.2004 passed by the trial Court on the application at Exhibit-13, by which the said application under Order 6, Rule 17 of Code of Civil Procedure has been dismissed. The suit was filed for recovery of the amount with interest. The suit was filed on 16.3.2002. When the suit was

instituted, it was instituted against Haribhau Kanakdhar and Kisan Kanakdhar showing them to be the heirs and legal representatives of one Shivajirao Kanakdhar. The suit was instituted under the impression that Shivajirao Kanakdhar was no more. After the heirs of Shivajirao Kankdhar filed written statement, the petitioner-plaintiff, for the first time, came to know that Shivajirao Kanakdhar was alive and, therefore, the present application was filed for substituting his name as defendant in the place of aforesaid defendants and for consequential changes in the body of the plaint. That application at Exhibit-13 has been rejected solely on the ground of limitation.

4. Mr Shah, learned counsel for the petitioner, submitted that the issue of limitation being a mixed question of law and fact, the trial Court ought to have allowed the amendment keeping the issue of limitation open to be decided at the stage of trial. He further submitted that the court below was wrong and unnecessarily hasty in rejecting the application for amendment without allowing the petitioner to address on the question of limitation and to lead evidence to satisfy how the amendment sought was not barred by limitation. Mr Sakhare, learned counsel for the respondents, on the other hand, submitted that the trial

Court has rightly rejected the application and this Court need not exercise its limited jurisdiction under Article 227 of the Constitution of India to interfere with the impugned order. He further submitted that the application under Order 6 rule 17 of CPC itself was not maintainable and the only remedy was to file an application under Order 1 rule 10. He then submitted that by making consequential amendment, the petitioner has completely changed the nature of the suit and such amendment cannot be allowed. In support of this contentions, he placed reliance upon the following judgments in T.N.Alloy Foundry Co Ltd Vs. T.N.Electricity Board and ors, (2004) 3 Supreme Court Cases 392, Subodh Kumar Gupta and ors Vs. Alpana Gupta and ors, (2005) 11 Supreme Court Cases 578, Marcus D'Costa Vs. Anand Bhissi Gaonkar and anr, 2001 (4) Bom.C.R.825 and Sou.Shakuntala J Gujar Vs. Shri Dilip R Pawar and anr, 2001(2) ALL MR 566.

5. Recently, the Supreme Court in Balasaria Construction (P) Ltd.Vs. Hanuman Seva Trust and Others, (2006) 5 SCC 658 has reiterated the well settled principle of law that the question of limitation is a mixed question of law and fact and ex-facie on the reading of the plaint it cannot be held that the suit is barred by the limitation. In other words, the suit

could not be dismissed as barred by the limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Similarly the Supreme Court in paragraph 5 of the Judgment in B.K.Narayana Pillai Vs Parameswaran Pillai, (2000) 1 SCC 712, has made the observations, which can usefully be referred to. The relevant observations read thus:

> "3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach.Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation."

If the aforesaid test is applied in the present case, the amendment sought could not be denied. The contention that the relief sought by way of amendment was barred by time, is arguable in the circumstances of the case and that the plea of limitation being disputed could be made subject matter of the issue after allowing

the amendment as prayed for. In the circumstances, I see no reason to reject the amendment on the ground of limitation at this stage.

6. The submission of Mr.Sakhare, learned counsel for the respondents, that the application under Order 6 rule 17 itself was not maintainable and that the petitioner ought to have filed the application under Order 1 rule 10 of CPC, is not sustainable. The amendment sought cannot be treated as one under Order 1 rule 10 CPC though it is referable to the said provision. Similarly, the submission that by making consequential amendment the petitioner has completely changed the nature of the suit, also is rejected inasmuch as, in my opinion, the basic structure of the suit has not been changed. In view of the peculiar facts and circumstances of the case, the judgments relied upon by Mr Sakhare are of no avail to the respondents. In the circumstances, this petition is allowed. Insofar as the question of limitation that was raised could be made subject matter of the issue after allowing the amendment, and accordingly it is kept open to be considered in the course of the trial. The petitioner to carry out the amendment within two weeks from the date of receipt of this order, failing which the trial Court shall proceed with the case without amendment. It

is open for the respondents-defendants to file additional written statement if they so desire, within six weeks from the date of carrying out the amendment by the petitioner. The trial Court shall decide the suit as expeditiously as possible and preferably within ten months from the date of receipt of this order.

. While allowing this petition, I shall not be understood to have expressed any opinion on the question of limitation. All contentions are kept open. Rule is accordingly disposed of.

(D.B.BHOSALE,J.)